Mountains & Marshes

South Carolina Environmental Law Project • P. O. Box 1380 • Pawleys Island, S. C. 29585 • 843-527-0078

December 2003

Quality Management of South Carolina's Coast

Is our Coastal Management Agency up to the Task?

Commentary by SCELP Director, ***Jimmy Chandler***

ANYONE PAYING ATTENTION to the list of cases tackled by the South Carolina Environmental Law Project over its 16-year existence knows that most of our time is spent dealing with coastal issues. While we're very proud of our up-state successes, including roles in the closings of the Pinewood hazardous waste landfill, and the Rock Hill ThermalKEM and Roebuck TOC hazardous waste incinerators, our day-in and day-out focus has always been the South Carolina coast.

The precedents set by our cases provide some of the most important rules for coastal development. Our first Willbrook Plantation case established that developers cannot justify dredging canals through wetlands by pointing to the economic benefits. Our second Willbrook Plantation case, and our Buzzard's Roost Marina case, secured citizens' due process rights – the constitutional rights to notice and opportunity for hearing – in environmental cases. Our Andell Harbor Marina case established that new marina basins must comply with wetlands policies and meet state water quality standards. We reinforced rules that prevent dredging of salt marsh and shellfish beds where there's no overriding public interest in our DeBordieu canal case. In the Four Holes Swamp Speedway case, our Amicus brief helped establish that coastal zone consistency certifications are "contested cases" in which parties have full rights to a hearing before an Administrative Law Judge.

The one thing these cases have in common is that in each of them our legal challenge overturned an erroneous decision made by the South Carolina Department of Health and Environmental Control, Office of Ocean and Coastal Resource Management (DHEC/OCRM), or its predecessor, the South Carolina Coastal Council. Without our intervention, wetlands would have been dredged and filled, shellfish destroyed or contaminated, and coastal habitats disturbed. And without our legal action, all of these activities would have been considered perfectly legal, covered by permits and certifications issued by our coastal management agency.

(Continued on page 2)

(Continued from page 1)

Despite these legal battles, for years I felt that our coastal management program was effective and well run. At one time, the South Carolina Coastal Council was recognized nationally as one of the shining examples of an excellent coastal management agency. Our 1977 Coastal Zone Management Act provides the legal tools for effective coastal resource protection. Our 1979 Coastal Management Program, the document that the Act deems the "management plan for the State's coastal zone," provides the policies and management tools for carrying out the Act's directives. The initial critical area regulations set out clear rules for protection of coastal resources, while still balancing the need for economic development.

. . . our
coastal management system
has gone
terribly awry.

However, it now seems to me that our coastal management system has gone terribly awry.

In recent years, we have seen trends that indicate to us that the agency has lost its focus, lost its sense of mission, and is now characterized by poor judgment, inconsistency, and day-to-day confusion.

Most of our case docket reflects what we believe are mistakes made by the agency in its permitting and certification decisions. We spend a lot of our time trying to work out problems to avoid appeals, but in too many cases appeals are necessary. We are thankful that in some of our cases, the agency made the right decisions and we are helping the agency defend appeals of those decisions.

Two areas of agency drift, confusion and inconsistency relate to the agency's freshwater wetland regulations and the legal status of the Coastal Management Program.

In a case highlighted in last December's Mountains & Marshes, OCRM was sued by a Beaufort development group. The suit challenged OCRM's authority to regulate isolated freshwater wetlands and asked the court to declare the Coastal Management Program unenforceable. The agency's attorneys vigorously defended the case, and we intervened on behalf of several groups. After we lost the case at the state circuit court level, OCRM and our clients appealed. We asked the SC Supreme Court to take the case immediately, and to suspend the circuit court order until the appeal was decided, and both of these requests were granted. SCELP and OCRM's attorneys filed a strong brief supporting the agency's wetland regulation authority and the validity of the Program.

Then the agency flinched. OCRM entered into discussions with the Beaufort development group which led to a settlement agreement. The agreement allowed the unprecedented filling of over 7 acres of wetlands, and OCRM joined with the developer in seeking dismissal of the appeal. SCELP argued against the settlement vigorously. We wanted a judicial answer to the issues raised, and we felt that our strong brief was a winning one. In the end, after OCRM decided to enter the settlement agreement over our protests, there was nothing we could do.

Our annual photo of Jimmy and his daughter, Leigh, now 9.

As a result of this settlement, the OCRM freshwater wetland regulation program and the entire Coastal Management Program remain under a cloud of legal uncertainty.

In the months since this settlement, we have received assurances from OCRM officials that the agency will vigorously assert its jurisdiction over freshwater wetlands, and enforce the Coastal Management Program policies. However, we hear constantly from OCRM staff members who obviously have not gotten the message. These staff members tell us that the agency has to tread lightly in regulating freshwater wetlands, and the statements they make about the validity of the Coastal Management Program contradict what we hear from top OCRM officials.

In response to our complaints, the agency leadership has promised to make improved efforts to apply and enforce the rules, but we continue to find more examples of the agency's failure to follow its own freshwater wetlands rules.

We are left to wonder whether the top agency officials do not believe the things they

(Continued on page 4)

Daufuskie Going to Trial

A suit brought by several Daufuskie Island property owners, challenging the SC Beachfront Management Act, will go to trial in early 2004.

The suit concerns several lots at the southern tip of Daufuskie Island, the state's southern-most barrier island. In the mid-1990s, several large houses were built on some of the lots, and the houses in recent years have been threatened by erosion.

The owners wanted a permit to build a seawall to protect their property. Since 1988, the Beachfront Management Act has prohibited construction of new beach seawalls. The Act is based on the 1987 Report of the Blue Ribbon Beachfront Committee, whose studies concluded that seawalls lead to losses of public beach.

The suit challenges the validity of the Act on several grounds. It claims that if the owners are not allowed to construct a seawall, erosion will cause severe damage to their property and possible loss of their houses. If this happens, they allege that the State, by denying them a seawall, will have "taken" their property in violation of the Fifth Amendment to the US Constitution. They also allege that they have been denied equal protection of the law, and additional claims.

In 2002, a state court judge made a preliminary ruling allowing the construction of a seawall. The owners have posted a bond to secure the costs of removal of the seawall in the event they ultimately lose their case.

The South Carolina Coastal Conservation League has intervened in the case with SCELP representation. The League's involvement will protect the interests of Sierra Club, SC Wildlife Federation, and the League of Women Voters of Georgetown County, who were denied intervention.

Beaches are public property below the mean high water mark, owned by the State and held in trust for the use and benefit of all of the people. The Beachfront Management Act is founded upon the fundamental legal principle that a property owner (in this case, the State) need not allow its adjoining property owner (the lot and house owners) to construct a seawall that will ultimately cause damage to or loss of the public property.

If the property owners win their case, the Beachfront Management Act could lose its most effective tools for protecting the state's public beaches.

SCELP will vigorously defend this case and represent the public interest in protection of public beaches.

DeBordieu Project Threatens North Inlet

DeBordieu Colony has applied for a permit to renourish its beach with sand mined from the sand bar at the mouth of pristine North Inlet.

SCELP is working with several groups to oppose this project and protect North Inlet. The North Inlet estuary is the site of the University of South Carolina's renowned marine science laboratory and long-term ecological research. It is also a prized local recreation area and a part of the North Inlet-Winyah Bay National Estuarine Research Reserve.

Smiley Back Before Supreme Court

SCELP has filed its initial appeal brief in the case of Smiley vs. DHEC/OCRM. The appeal seeks to overturn an ALJ's ruling that Smiley, a daily user of the Isle of Palms beach, has no standing to appeal a permit that allows removal of up to 25,000 cubic yards of public beach sand per month to protect private property. We hope to get a ruling before the end of 2004.

This photograph by Chip Smith, photographer/writer/naturalist.

(Continued from page 2)
have told us about agency policy, or they have made insufficient efforts to inform and monitor the rest of the staff about agency authority and application of freshwater wetlands policy.

This lack of agency cohesiveness suggests that OCRM does not have an adequate program of keeping its staff informed and educated as to agency regulations, policies and positions. We find ourselves constantly talking to agency staff members who do not seem to know or understand the rules they are supposed to be applying and enforcing.

At least some of the problems are caused by the budget crunch that has been going on for several years. OCRM has fewer staff members and a greater work load than ever before.

The staff problems are particularly acute for OCRM's legal office. For at least ten years, the OCRM legal office has been staffed by two attorneys and a paralegal. Since March of 2002, OCRM has operated with just one attorney, and now its paralegal devotes only half of her time to legal work. The agency's legal docket is more active and crowded than ever.

It is not exactly an ideal situation to have an agency staff that seems unfamiliar with the laws and regulations they are supposed to apply and enforce, and an agency attorney who is forced to run from hearing to hearing with little or no time for planning or designing agency legal strategies. There is plainly no time for the staff attorney to provide training to the staff, or to help the staff with day-to-day regulatory interpretations.

This situation has deprived the agency of a coherent and unified legal presence. The agency's attorney defends each agency staff decision, with little apparent thought about how the legal arguments will affect long-term agency policy. Testimony from one case causes problems in others. For example, staff testimony in an appeal challenging a recent community dock permit convinced a judge that OCRM has no enforceable standards for these docks. Later, when the agency tried to limit an expansion of the same community dock, the judge reminded the staff of the prior stance, and seemed willing to allow nearly unlimited expansion.

. . . the agency has
lost its focus,
lost its
sense of mission,
and is now characterized by
poor judgment,
inconsistency,
and
day-to-day
confusion.

Recent meetings of the Council on Coastal Futures, a group charged with responsibility to review OCRM's operation and make recommendations for the future, show that the OCRM staff has some good ideas about how to improve agency operations. But on a day to day basis, we see little evidence that any of these ideas are ever implemented.

For example, in Council meetings, the OCRM staff has proposed a system of informal mediation that could occur early in the permitting process, particularly when controversial cases are identified early. But in a recent key permit decision, the staff was well aware of the controversial nature of the case, yet issued a permit that was guaranteed to be appealed, without making any effort to bring both sides together in an attempt to resolve the case up front.

In the Spring of 2004, we will be completing our initial work on SCELP's comprehensive assessment of the South Carolina coastal management program. We will issue a report that will provide more detail and more recommendations than we have room for in this newsletter. We will use this report in our continuing effort to obtain quality management for this state's coastal zone.

We have heard that when Coastal Council was abolished in 1994, and the coastal program given to DHEC, it was because of the program's early effectiveness. Coastal Council was a special agency, with key support from Jim Waddell, a powerful State Senator. It was run by Dr. Wayne Beam, who at that time seemed to have a vision for coastal management. Now Sen. Waddell and the Coastal Council are deceased, and Dr. Beam has gone to work for the "dark side" as a consultant and lobbyist who seems to always push the limits on behalf of developers. Former agency attorneys and hearing officers are now constantly beating the agency in court and before Administrative Law Judges.

It is obvious to me that those who wanted to rein in Coastal Council have succeeded beyond their dreams. It will take a lot of hard work to protect coastal resources with this weakened coastal program, and even more hard work to bring this program back to effectiveness.

Will South Carolina Protect Freshwater Wetlands?

After a U.S. Supreme Court decision in early 2001 left an estimated 400,000 acres of South Carolina's isolated freshwater wetlands unprotected under the federal Clean Water Act, the Department of Health and Environmental Control ("DHEC") is finally taking action to set up a state permitting program for these wetlands.

Responding to a petition from conservation groups, DHEC proposes to exercise its existing authority under the S.C. Pollution Control Act to establish a permitting program that would provide state protection of these wetlands. As drafted by DHEC, new regulations would prohibit the filling of isolated freshwater wetlands without a permit from DHEC.

Outside of the coastal zone, DHEC currently has no regulatory program in place to protect isolated freshwater wetlands. Before 2001, sometimes the agency was able to regulate these areas through a state certification of federal permits under Section 401 of the Clean Water Act. Since the U.S. Supreme Court ruling that isolated wetlands are not subject to federal jurisdiction, DHEC can no longer use this state certification program to prevent alteration or destruction of these wetlands.

The DHEC board will hold a public hearing on January 8, 2004 on the proposed regulations. We encourage anyone interested in wetlands protection to attend and speak out at the public hearing.

Some development groups argue that DHEC lacks legal authority to enact new wetlands regulations without a new wetlands statute. Renewed efforts to enact a state freshwater wetlands statute will be moving forward during the 2004 legislative session.

SCELP is working with a coalition of environmental groups to push for improvements in the draft regulations, as well as for a strong wetlands statute. We will closely monitor any wetlands bill introduced in the General Assembly.

Proposed Legislation Would Cut Off Citizen's Rights

As we gear up for the next legislative session, once again we are facing substantial challenges to citizens' rights to enforce environmental protection laws.

The "automatic stay" provision of the DHEC permitting regulations, which allows citizens an appeal hearing on environmental permits before the landscape is altered, is again under attack. The automatic stay rule preserves the status quo to prevent environmental impacts from occurring before the challenge to the permit can be heard and decided. It also protects Constitutional due process rights by insuring that the appeal hearing is meaningful and before harm has occurred.

Last year, Representative Jim Harrison pushed a bill, H.4157, that would eliminate the automatic stay rule. The bill remains pending in the House Judiciary Committee and Representative Harrison will continue seeking support for this bill. Senator John Land introduced a similar bill, S.634, in the Senate. Both bills are backed by the S.C. Tourism Council, a development group, which will lobby hard for this legislation. We also expect other legislative efforts to limit citizens' environmental rights.

If the automatic stay is eliminated, the fundamental fairness of the appeal hearings process will be dramatically altered. Instead of having a right to a meaningful hearing, a citizen will be forced to fight a costly legal battle to prevent environmental harm before even getting to the appeal hearing.

SCELP would like to thank everyone who contacted their Senators and Representatives and asked them to oppose these bills. Unfortunately, we need to continue to voice our opposition to bills that would take away citizens' rights.

Other Updates . . .

Cherry Grove Marsh Case Moving Slowly: A suit filed by a North Myrtle Beach family, claiming ownership of salt marshes and creeks in the Cherry Grove area of North Myrtle Beach, is slowly working its way toward trial in Horry County state court.

The suit, filed in the spring of 2003, seeks a declaration that the Perrone family owns a large area of marsh and creeks, and that the state has no right to regulate this area under the Coastal Zone Management Act. In April 2003, the state Attorney General's office and the state Office of Ocean and Coastal Resource Management (OCRM) agreed to a Consent Order that has halted all state permitting in the area until the case is resolved.

SCELP has filed motions to intervene on behalf of the SC Coastal Conservation League, Sierra Club, and local property owners, but so far no hearing on the motion has been held. The City of North Myrtle Beach has also filed a motion to intervene. SCELP and the City are seeking to defend the public's interest in these marshes and creeks, and to defeat the Perrone's claims.

SCELP is concerned that neither OCRM nor the Attorney General's office is adequately defending the public's rights in the claimed marshes. Our intervention is intended to allow us to ensure that these rights are vigorously defended.

Myrtle Trace Case Going Back to DHEC Board: A state circuit judge has remanded our Myrtle Trace case back to the DHEC Board. In 2002, the DHEC Board had overturned a permit for development of an 8 acre tract previously set aside for preservation as mitigation for a development's wetlands impacts. The Board said that once a site had been set aside for mitigation, only extraordinary circumstances could justify a change in the property's status. However, the original Board order made findings of fact that, under a later ruling of the SC Supreme Court, exceeded the Board's authority. The Board will now take a second look to determine whether its earlier ruling can stand without the additional findings.

McQueen "Taking" Case Finally Over: The US Supreme Court has ended the saga of Sam McQueen, whose lots at Cherry Grove washed away by natural water forces and reverted to salt marsh. By refusing to hear another appeal, the court upheld the SC Supreme Court's ruling that the State is not liable for McQueen's lost property. The case is a victory for coastal wetlands protection under the Public Trust Doctrine.

SCELP Staff, Amy Armstrong and Kathy Taylor, take time out to smile for the camera.

South Carolina Environmental Law Project, Inc.

SCELP is a 501c3 tax exempt non-profit corporation. Our mission is **to protect the natural environment of South Carolina by providing legal services and advice to environmental organizations and concerned citizens and by improving the state's system of environmental regulation.** SCELP's cases have saved wetlands, improved water quality, reduced hazardous waste risks, protected other natural resources, and helped enforce penalties against those who have violated our environmental laws. SCELP's clients have included local state and national groups. We also provide continuing legal advice to concerned citizens and promote environmental law education.

James S. (Jimmy) Chandler, Jr., is President and General Counsel of SCELP. Staff members are **Amy Armstrong**, Equal Justice Works Fellow and staff attorney, and **Kathy Taylor**, Assistant to the President. Our Board members are:

Office Address:
430 Highmarket Street
Georgetown, SC 29440

Telephone: (843) 527-0078
FAX: (843) 527-0540
E-Mail: jchandler@scelp.org
Web site: www.scelp.org

Mailing Address:
Post Office Box 1380
Pawleys Island, SC 29585